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Federal Communications Commission
Office of Secretary

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of	)	CC Docket No. 94-129
	)	
Implementation of the Subscriber	)	
Carrier Selection Changes	)	
Provisions of the	)	
Telecommunications Act of 1996	)	
	)	
Policies and Rules Concerning	)	
Unauthorized Changes of	)	
Consumers' Long Distance	)	
Carriers	)	APRIL 16, 1999

COMMENTS IN RESPONSE TO THE JOINT PETITION FOR WAIVER OF SLAMMING LIABILITY RULES AND THIRD PARTY ADMINISTRATOR PROPOSAL

The Attorneys General of the States of Colorado, Connecticut, Illinois, Kansas, Maryland, Minnesota, New Mexico,and New York ("the Attorneys General") submit these Comments in response to the Joint Petition for Waiver filed with the Federal Communications Commission ("Commission") March 30, 1999, by certain carriers and trade associations.

The Attorneys General applaud the Commission in a suggesting novel and creative approach to address the slamming concerns faced by our citizens. The Commission's idea for an independent third party administrator, acting within the context of the Commission's rules, has the potential to streamline both consumer relief and carrier liability when a consumer is slammed.

Likewise, the Joint Parties should be recognized for the thoughtful approach to a serious consumer problem. The Joint Parties' proposal for a Third Party Administrator ("TPA") contains certain features which will likely provide benefits to our citizens. However, the Attorneys General have a number of specific concerns and questions which should be addressed prior to Commission consideration of this matter.

The Attorneys General believe that the TPA process should expand the remedies available to consumers rather than serving as a wholesale substitute for all current systems to address consumer slamming complaints. While the Attorneys General support the concept and benefits of "one-stop shopping" for remediation of slamming, this process should not preclude consumers from pursuing other means of redress. For example, if a local exchange carrier can accomplish the same services for a victim of slamming, the consumer should not be foreclosed from that option. Similarly, if a consumer would be entitled to relief under state law, then there should be adequate notice of that option and the flexibility to pursue that relief. Finally, the remedies provided

in the Commission's rules should be readily available to consumers who choose to bypass, or who were dissatisfied with, the non-binding TPA process.

The Attorney Generals also have the following specific concerns:

I. WAIVER OF COMMISSION RULES

The Joint Parties, as part of their proposal for the establishment of a TPA, have requested a waiver from certain of the Commission's rules regarding slamming. Specifically, the Joint Parties have requested that they, and others carriers who elect to join in TPA system, not be bound by:

- Section 64.1100(c) – the provision making unauthorized carriers liable to authorized carriers for all payments made by a subscriber, plus other costs such as billing and collection expenses. The section also states that Part 64, Subpart K remedies are in addition to, not in lieu of, any other remedies available at law;
- Section 64.1100(d) – the provision that would absolve slammed subscribers for up to 30 days, and would require carriers to inform consumers of their right to an absolution period;
- Section 64.1170 – procedures regarding reimbursement of subscribers who have made payments to unauthorized carriers. This section's provisions give authorized carriers 30 days to request proof of verification from unauthorized carriers; require unauthorized carriers to respond within 10 days (with either proof of verification or transfer of an amount equal to all charges paid by the subscriber); require authorized carriers to restore subscriber premiums (regardless of payments received from unauthorized carriers); require payment of authorized carrier's billing and collection costs; and provide

for refund/credit of all amounts paid by the subscriber over and above what would have been paid "but for" the slam (no three month limit on reimbursement) and:

- Section 64.1180 – requirements applicable to situations where the subscriber has noticed the slam and has not paid for unauthorized charges. This section requires the unauthorized carrier to remove all charges incurred during the 30-day period after the slam. Authorized carriers are required under this section to conduct reasonable and neutral investigations, including, where appropriate, contact with the subscriber and the accused carrier. A decision on the alleged slam is required within 60 days.

While many of the requirements set out in the Commission's liability provisions are reflected in the TPA proposal, there are several significant differences (e.g., the nature of the absolution, the time period for reimbursement of payments made to unauthorized carriers, and the preservation of other remedies at law). The Joint Parties state that the TPA system is a non-binding dispute resolution procedure, and that if a consumer is unsatisfied the consumer may file a complaint with the FCC or other appropriate government agencies for relief. It is not clear what liability rules would apply to a participating carrier should a consumer file a complaint, rather than pursue the TPA process. It is understanding of the Attorneys General, and the Commission should make clear, that the waiver will have effect only to the extent that the consumer is pursuing the TPA process. We believe that the provisions of Sections 64.1100, 64.1170 and 64.1180 are to be considered underlying and controlling. Second Report par. 56.

II. NOTICE TO CONSUMERS

A vital component to the success of the TPA will be the ability to disseminate accurate and sufficient information to consumers about their avenues of recourse for alleged slamming.

The Attorneys General believe that a standardized message would be beneficial. One model that the Commission may wish to consider is an introductory disclosure message, such as required by federal law to be included in each pay-per-call message. 15 U.S.C. 5711.

The notice to consumers should, at the very least, disclose that the TPA process is non-binding arbitration and that consumers may have more beneficial recourse under state or federal law. The notice should be disclosed at the start of a telephone call to the TPA and on correspondence sent by the TPA to a consumer in connection with a slamming complaint.

III. SUITABLE VERIFICATION

Under the Joint Parties' proposal, upon receipt of a complaint, the TPA will notify the accused carrier, which then has 20 days within which to respond to the complaint. The TPA proposal states that the accused carrier may produce "a copy of the FCC-authorized verification, *a business record* of its verification, or *other evidence* that it may choose to produce" (emphasis added.) This leaves accused carriers the option of producing something short of the requisite proof of verification of a carrier change order mandated by the Commission in its Second Report and Order. A crucial aspect of the TPA's function is determining whether a complaining consumer was in fact switched to the accused carrier without that consumer's authorization or without verification of the authorization (both of which are required by the Commission's rules.) The Attorneys General are concerned that this determination may be made on the basis of legally insufficient information.

The experience of the Attorneys General in bringing slamming enforcement actions has been that the accused carriers produce purported verification of carrier change order requests. Some accused carriers have produced, without more, affidavits from employees of the verification

company stating that they verified a particular carrier change order request in accordance with Commission regulations. The affidavits contain the conclusions of an interested party as to the legal sufficiency of the independent third party verification. Without the actual content of the third party verification conversations, these affidavits are of little value in substantiating proper verification.

It has also been the experience of the Attorneys General that accused carriers have falsified verification documents, such as forged Letters of Authorization ("LOA") or independent third party verification tapes containing the voice of someone other than the subscriber who supposedly authorized the carrier change. After consumers have been contacted and presented with the purported verification, they have claimed that the signature on the LOA or voice on the tape is not theirs. In these instances, actual physical copies of the purported verification do not demonstrate compliance with the Commission's regulations regarding carrier changes.

IV. CONSUMERS RIGHT TO RESPOND

Under the Joint Proposal, "[t]he TPA has an additional 10 business days to complete its investigation and render its decision. If a copy of the actual, FCC-authorized verification record is provided . . . the presumption shall be that no slam occurred. The TPA shall, as a general rule, attempt to contact the customer if it appears as though there is valid FCC-authorized verification." The Attorneys General are concerned that contacting the complaining consumer is permissive, rather than mandatory. In other non-binding arbitration scenarios the complaining consumer is guaranteed a chance to rebut the documentation or other proof submitted by the merchant. See 16 CFR Part 703 (Informal Dispute Resolution Procedures Under the Magnuson-Moss Act).

Such an opportunity is consistent with a general sense of fairness, especially in light of the circumstances described above, involving falsified verification documentation.

V. CONSUMER REDRESS

Based on the experience of some state Attorneys General with rerating, we agree that the fifty-percent proxy proposed by the Joint Parties provides simplicity which may prove beneficial to the public. However, we urge that guidelines be adopted for flexibility in implementing the proxy to ensure essential fairness, particularly in those situations where the unauthorized carrier's rates are so high that a 50% refund would not adequately compensate the consumer.

VI. RESTORATION OF PREMIUMS

The TPA proposal provides for restoration of premiums, where possible, based on the consumer's average usage over the most recent three month period in which the consumer used his or her preferred carrier's service. The Attorneys General feel that premiums should be restored as fairly and accurately as possible. In order to accomplish this, the TPA must treat the consumer as though he or she were a continuous customer of his or her preferred carrier. Any other method would be unfair to the consumer. For example, if the value of a premium is directly related to the volume of usage and a consumer makes a high volume of calls during a certain time period and later finds out he or she was a customer of the accused carrier during that time period, he or she would not receive the benefit of his or her premium for that high volume period. Instead, the premium value would be based upon a time period preceding the high volume period. The same is true if a consumer makes a low volume of calls in the three month period directly preceding the date he or she was switched to the accused carrier.

VII. REPORTING

The Attorneys General rely on consumer complaints to detect patterns of deceptive practices and take appropriate action to combat such practices. Therefore, it is imperative that the Attorneys General have access to the information the TPA collects. The Attorneys General request that the TPA be required to report certain information (at a minimum, the information described in the TPA proposal as well as a description of the complaint) to them no less frequently than monthly. In addition, if the Attorneys General desire further information than is contained in the regular reporting, including, but not limited to, copies of written complaints and other relevant information, then the TPA must be required to provide such information upon request from any of the Attorneys General.

VIII. GOVERNANCE BY INDUSTRY BOARD

The Joint Parties' proposal would establish a Board to control and direct the TPA. This Board is to be made up of at least representatives from four industry trade associations (i.e., CompTel, Telecommunications Resellers Association, Association for Local Telecommunications Services and United States Telephone Association) and up to 17 carrier company representatives. No consumer, government, non-profit organization or community groups are to be represented.

A four member Advisory Committee, made up of representatives from government associations, will be invited to attend meetings and participate in the industry Board's discussion, but will not be authorized to vote on matters before the Board.

The responsibilities of the Board include, among other things: 1) selection, training, management, and oversight of the TPA and staff; 2) development of bylaws for the Board and operating procedures for the program; 3) hiring of outside legal counsel, accounting firms, and

arbitration vendors; 4) review and release of reports on carrier and Third Party Administrator activities and performance; 5) development of procedures for review of confidential matters in executive session; and 6) securing funding for this regulatory alternative.

The TPA has been described in the Joint Parties' Petition as a neutral, independent administrator. With respect to control by any individual carrier, this may be true. But, when considered from the perspective of residential consumers, commercial subscribers, regulatory agencies and law enforcement officials, the Administrator cannot be viewed as neutral or independent.

The Attorneys General believe that without a balance of representation on the governing Board it is unlikely that consumers will perceive of the Administrator as neutral and independent. As stated by the Joint Parties, this Administrator "will be resolving customer complaints, and in this dispute resolution role, must have no outside influence or business motivation." The Joint Parties understand that "even the appearance of a conflict would detract from the functioning of the [A]dministrator." (Petition at Page 15).

If the TPA alternative is to have credibility with consumers it should be governed by a Board that includes representative of the interests that are impacted by its decisions, not just by those organizations providing the money for its operation. At a minimum the Board should include members from consumer organizations, community groups, commercial purchasers of long-distance service and small businesses. The Board should be prepared to conduct its business in the open, with the public able to participate in its management in a meaningful manner. While there may be a need for executive sessions to review confidential information, these instances should be limited. There are many government and quasi-governmental boards that review and discuss confidential business information that may be used as a model.

The Joint Parties have proposed that the governing Board be exempt from the requirements of the Federal Advisory Committee Act, which provides for openness and a balance of interests on boards and commissions that advise government agencies. While the TPA's Board may not be intended as an advisory organization, it will be submitting reports to the Commission, states and other governmental bodies. These reports may be utilized by federal agencies in making decisions about government policies and procedures. In view of the duties and obligations of the TPA and this system's impact on the general public, the Federal Advisory Committee Act, its goals and objectives are valuable and worthy of review.

With respect to procedures for resolution of disputes, it is most important that both sides feel that the system is fair and equitable. Under the Joint Parties' Petition, the details and criteria for review have been left to the industry-controlled Board. It is important that minimum standards be established by the Commission, rather than by the carriers.

One model that could be reviewed is the Federal Trade Commission's mechanism for informal dispute resolution under the Magnuson-Moss Warranty Act (16 CFR Part 703). This dispute resolution procedure seeks to ensure that decisions are not improperly influenced by the sponsoring organization. Required measures include: advance funding of the dispute resolution system and its staff; all personnel decision are based solely on merit; and staffing levels must be set to ensure fair and expeditious resolution of disputes. In resolving disputes, both parties are immediately informed of the matter and invited to explain and rebut any information. Either party may submit additional materials. And, certain information is required to be made available to the consumer, including: descriptions of the process and a consumer's rights; notice of time, date and place of presentations on the dispute (with a right to be present); and copies of all records

regarding the consumer's dispute. In addition, the Federal Trade Commission has adopted regulations, binding on the dispute resolution administrator. These regulations set minimum record keeping standards, provide for openness of records and proceedings and clarify that statistical summaries and reports shall be made available to any person for inspection and copying.

IX. PROGRAM REVIEW

The Petition filed by the Joint Parties requests that the Commission take the extraordinary step of waiving Commission liability rules for carriers who participate in a non-binding industry funded third party administrator. Certainly given the number of questions raised by the Attorneys General in these comments and presumably other filed comments, the Commission should grant the waiver for a specified time period. The Attorneys General recommend a trial period of one year at which time there should be an opportunity for public comment and review.

CONCLUSION

The Attorneys General understand that the TPA proposal is an evolving concept. Therefore, we respectfully reserve our right to comment on any changes or new proposals and request that we be included in any workshops or discussions to further develop and implement the TPA proposal.

Respectfully submitted,

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Carriers	)	**APRIL 16, 1999**

OBJECTION TO JOINT MOTION
FOR EXTENSION OF EFFECTIVE DATE OF RULES
OR, IN THE ALTERNATIVE, FOR A STAY

The Movants in this matter, MCI WORLDCOM, Inc., AT&T Corporation, Sprint Corporation, Competitive Telecommunications Association, Telecommunications Resellers Association, Excel Telecommunications, Inc., Qwest Communications Corporations, and Frontier Corporation (hereinafter "Movants"), have requested an extension of time for the effective date of the liability rules adopted by the Commission in this Docket until such time as the Commission should favorably act upon their petition and implementation of a third party administration system. Alternatively, Movants have requested that the Commission's recently promulgated slamming rules be stayed pending consideration of petitions for reconsideration filed by some of the Movants.

The State of Connecticut, represented by Attorney General Richard Blumenthal, objects to both motions for the reasons set forth below, and urges the Commission to proceed with the long-awaited slamming rules. The Attorney General is the chief legal officer in the State of Connecticut and is responsible for the enforcement of consumer protection laws, including provisions that protect consumers from unauthorized changes of long distance telephone service, a practice known as "slamming." The Attorney General has, in the past and at the present, pursued legal action against slammers. Additionally, Connecticut state law, Conn. Gen. Stat. § 16-256i, specifically incorporates Commission regulations in determining whether there has been an unauthorized carrier change on intrastate services.

Because the interest in protecting consumers outweighs any concerns alleged by the Movants, it is incumbent upon the Commission to deny the Movants' motion.

BACKGROUND

In its Second Report and Order, the Commission specifically set forth a delayed implementation of its new slamming rules to provide the Movants with the opportunity to pursue its requested waiver, Second Order ¶¶ 5 and 253. The Movants have timely filed their petition for waiver. Any delay in the implementation of those rules or of the requested waiver, should it be granted, will be materially adverse to the consumers victimized by slammers.

The Movants' argument that the rules are overly complex and unacceptably burdensome are incongruous given the technical knowledge of this industry. Re-rating is not a new concept. It has been the suggested approach by the Commission for a number of years. Forfeiture of revenues from the slammer to the authorized carrier is not a new concept. It was specifically

required by Section 258 of the 1996 Telecommunications Act. The Movants have not established their burden of proof to established the need for a stay.

In its Second Order, the Commission noted that there may be as many as 500,000 customers slammed in 1997 alone. While this objector believes that this may be a conservative figure, it certainly underscores the necessity of immediate implementation of the promulgated rules.

The six months that the Movants request to implement its third party administration system proposal would leave potentially another 250,000 consumers without the protections provided by the Commission in the new rules. The Movants cannot satisfy their burden to demonstrate "good cause" for entry of a stay.

It is further noted that MCI WorldCom has filed a protective petition for review in the DC Circuit. Should the Commission deny the Movants' motions, such relief can certainly be pursued in that forum.

CONCLUSION

For the foregoing reasons the undersigned respectfully submits that the Movants' request be denied.

Respectfully submitted,

Richard Blumenthal

RICHARD BLUMENTHAL
ATTORNEY GENERAL
STATE OF CONNECTICUT

4/16/99